SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 29 19
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 196[redacted]

No. [redacted]170

SAMUEL MOSLEY,

Petitioner,

against

CIA MAR. ADRA'S. A.

and

LIPSETT STEEL PRODUCTS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD T. BEHRENS
CHARLES H. LAWSON,
70 Pine Street,
New York, N. Y.
and
CHARLES A. ELLIS,
42 Broadway,
New York 4, N. Y.
Counsel for Petitioner

INDEX TO PETITION

	PAGE
Petition	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitution Provision Involved	2
Statement of the Case	3
Facts	4
Reasons for Allowance of the Writ	10
I. "Special and important reasons for the grant of Certiorari"	10
II. The reversal herein violates the Seventh Amendment and conflicts with decisions of this Court which have held that lower court decisions invaded the function of the jury	13
Conclusion	19

TABLE OF CASES

Alaska SS Co. v. Petterson, 347 U. S. 396	19
Atlantic & Gulf Stevedores Inc. v. Ellerman Lines, 369 U. S. 355	11, 12, 16, 17, 18
Basham v. Pennsylvania RR Co., — U. S. —, 83 S. Ct. —, 10 L. Ed. 2d 80	11
Cox v. Esso Shipping Co., 5 Cir., 247 F. 2d 629	18
Dice v. Akron, C. & Y. Co., 342 U. S. 359	12
Ellis v. Union Pacific R. Co., 329 U. S. 649	12
Ferguson v. Moore-McCormack Lines Inc., 352 U. S. 521	15

PAGE

Gallick v. Baltimore & Ohio Railroad Co., 371 U. S. ——, 83 S. Ct. 659, 9 L. Ed. 2d 618 ....11, 12, 13, 14, 15

Gallick v. Baltimore & Ohio Railroad Co. (Ohio), 173 N. E. 2d 382 13

Harrison v. Pennsylvania R.R. Co., —— U. S. ——, 83 S. Ct. ——, 10 L. Ed. 2d 80 11

Jacob v. City of New York, 315 U. S. 752 .....15, 16

Mahnich v. Southern SS Co., 321 U. S. 96 18

Michalic v. Cleveland Tankers Inc., 364 U. S. 325 ....16, 18

Mitchell v. Trawler Racer Inc., 362 U. S. 539 19

Morales v. City of Galveston, 370 U. S. 165 17

Rogers v. Missouri Pac. R. Co., 352 U. S. 500 ....11, 12, 16

Ross v. Steamship Zeeland, 4 Cir., 240 F. 2d 820 17

Salem v. United States Lines, 370 U. S. 31 19

Schulz v. Pennsylvania R. Co., 350 U. S. 523 12

Senko v. La Crosse Dredging Corp., 352 U. S. 370 12

Tennant v. Peoria & P. U. R. Co., 321 U. S. 29 ....12, 15, 16

Tiller v. Atlantic Coast Line, 323 U. S. 574 17

United New York and New Jersey Sandy Hook Pilots Association v. Halecki, 358 U. S. 613 17

Weyerhaeuser SS Co. v. Nacirema Operating Co., 355 U. S. 563 17

Wilkerson v. McCarthy, 336 U. S. 53 16

CONSTITUTIONAL PROVISION

Seventh Amendment 2, 12

INDEX TO APPENDIX

	PAGE
Judgment of Court of Appeals	20
Opinions of Court of Appeals	21
Charge of District Court	35

In the

Supreme Court of the United States

OCTOBER TERM 1962.

No. .....

SAMUEL MOSLEY,

Petitioner,

against

CIA. MAR. ADRA, S. A.

and

LIPSETT STEEL PRODUCTS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Samuel Mosley, a disabled longshoreman who, after a trial by jury and verdict in his favor, obtained a judgment against the respondent Cia. Mar. Adra, S. A. for damages for personal injuries sustained aboard the merchant vessel *S.S. Turmoil* owned and operated by said respondent, by reason of the unseaworthiness thereof, while engaged as an employee of the third-party respondent Lipsett Steel Products, Inc. in loading the vessel while it was moored in Port Newark, N. J., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit rendered February 28, 1963, which reversed the judgment of the District Court.

Opinions Below

The charge of the District Court to the jury (R. 29a-46a; Irving Ben Cooper, D. J.) printed in the Appendix hereto, *infra*, page 35, is unreported. The three opinions rendered in the Court of Appeals by Judges Marshall, Friendly and Clark, printed in the Appendix hereto, *infra*, pages 21, have been reported in 314 F. 2d 223, *et seq.*, Adv. Ops.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was entered February 28, 1963. The jurisdiction of this Court is found in 28 U.S.C. §§ 1254(1) and 2101(c).

Question Presented

Whether the decision and judgment of the Court of Appeals herein improperly invaded the jury's function and province under the Seventh Amendment to the Constitution of the United States and controlling decisions of the Supreme Court of the United States and erroneously deprived petitioner of the District Court judgment entered upon the verdict of the jury.

Constitutional Provision Involved

The Seventh Amendment to the Constitution of the United States provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Statement of the Case

Petitioner, a longshoreman, instituted an action at law in the United States District Court for the Southern District of New York against the respondent Cia., Mar. Adra, S. A., owner of the *S.S. Turmoil*, for damages for personal injuries sustained on said vessel on the 15th day of October, 1956, while engaged as an employee of Lipsett Steel Products, Inc., in loading said vessel, alleging a first cause of action for unseaworthiness (R. 60a) and a second cause of action for negligence (R. 61a). The respondent Cia. Mar. Adra, S. A. obtained an order bringing in Lipsett Steel Products, Inc., and another, as third-party defendants (R. 1a). After a trial before District Judge Irving Ben Cooper and a jury, the Court dismissed the negligence cause of action, denied the motion with regard to the unseaworthiness phase of the action (R. 26a); the jury rendered a verdict for plaintiff for $80,000, and in favor of the respondent Cia. Mar. Adra, S. A. against the third-party defendant Lipsett Steel Products, Inc. for a like sum (R. 3a) and judgment was entered therefor (R. 51a). Motions made by said respondents to set aside the verdict and for judgment notwithstanding the verdict (R. 52a; 54a) were denied by Judge Cooper (R. 5a). On appeals by said respondents to the Court of Appeals for the Second Circuit, a panel of that Court (Clark, Friendly and Marshall, C. JJ.) reversed, with an opinion by Judge Marshall, a concurring opinion by Judge Friendly and a dissenting opinion by Judge Clark (R. 164a-177a, and Appendix, *infra*, pp. 22, 32, 33).

The only evidence offered was the undisputed evidence offered by petitioner. The facts, therefore, are not in dispute, and are as shown by petitioner's evidence.

Facts

On October 14 and 15, 1956, plaintiff and other members of a longshore gang employed by respondent Lipsett Steel Products, Inc. worked in connection with the loading of scrap metal on the vessel. For this purpose a chute made of steel was used (R. 77a). The chute was approximately forty feet long and about four to five feet wide at the top, with a lip at the bottom tapering off to about two and a half or three feet wide; it was rounded up like a half barrel, and at three or four feet from the bottom end it tilted up (the part that tilted up being called the lip) so that scrap metal dropped into the chute would come down the chute and be thrown upward (R. 81a).

On October 14, 1956, the day preceding petitioner's injury, they had finished loading scrap into the lower hold of the vessel (R. 70a-71a) and had placed iron beams, such as used for supporting hatch covers, across the hatch opening to the lower hold, but "on this particular vessel we don't put the hatch covers on" (R. 74a-75a). They had continued loading scrap in the square of the hatch, bringing it up to a depth of about three and a half or four feet, leaving just enough space to put the chute through for loading the corners and wings of the No. 5 'tween deck, when work was suspended for the day (R. 75a-76a). At the end of the day's work on the 14th the chute was removed (R. 79a).

On the morning of October 15, 1956, the chute was again placed in position to continue the loading (R. 80a-81a), and petitioner went down into the 'tween deck and set the lip of the chute to the farthest corner of the hatch (R. 81a-82a); and the first "shot" was completed (the "shot" meaning all that could be put at that corner before moving the lip of the chute) and he moved the lip over (R. 82a) "approximately a couple of feet. That is in order to give my next loading area right alongside that farthest corner,

to bring that even"; and the loading of the second shot continued for approximately 35 or 40 minutes before he was hurt (R. 83a-84a).

Petitioner testified very simply and in straight-forward manner how the accident occurred; and notwithstanding cross examination by both counsel for the two respondents, his testimony was not shaken. He described what happened as follows:

"Q. Now, what happened to you when you were hurt? A. Well, upon this last load I seen a piece of steel that was lodged in the mouth of the chute. So I hollered up deck to my foreman was there any more steel upon that truck which was being unloaded by the magnet. He said no. So I told him, 'Hold up everything because something is on the lip of the chute.' Therefore I looked—I reached in the back of me, which I have a hook. I attempted to walk [62] up to it to pull this piece of metal out of the mouth of this chute. In doing so, pulling it, pull it all the way, my feet began to fall, slip upon me, and the hook fell off. Then I fell." (R. 84a)

* * * * * *

"Q. Tell us, what is this hook? A. This hook is a large, long piece of metal, steel, which is fashioned to a hook, to the length of about five or six feet long.

Q. What sort of metal was this, Mr. Mosley? A. That was iron.

Q. Beg your pardon? A. Iron.

Q. Iron? A. Yes, sir.

Q. About how big was it? A. Oh, I would say three quarters of an inch thick.

[64] Q. Was this flat metal or— A. Round.

Q. Round metal? A. Yes, sir.

Q. Do you know where it came from? A. No, I do not." (R. 85a)

* * * * * *

"Q. Now, then, what is it that you did in order to try to dislodge this piece of metal that was stuck in the chute? A. Seeing this piece of metal stuck in the chute, I taken my hook, fastened it around the top of this metal, and I went to pull upon this hook in order to remove this piece of metal out of there, but in so doing, pulling as hard as I did, my feet begin to slip, and as I started to slip the hook slipped off and I fell.

Q. What caused your feet to slip? A. Metal that I was standing upon on deck.

* * * * * * *

Q. Before you slipped on this metal, did you see it? A. No, sir.

Q. Was there any natural light at that spot where you slipped? A. No, sir.

Q. Was there any artificial light in the hold? A. No, sir.

Q. When you slipped, what happened to you? A. I fell backward.

Q. Did you fall all the way down? A. All the way down, sir." (R. 87a-88a)

* * * * * * *

"(89) Cross Examination by Mr. Cichanowicz:

* * * * * * *

(95) Did the hook come off this scrap metal? A. Oh, yes, sir." (R. 10a)

* * * * * * *

"(113) Cross Examination by Mr. Catoggio:" (R. 12a)

* * * * * *

"The Witness: Well, first, when you are working under something you cannot see, you would take and set your feet as best you possibly can, whatever you are standing on." (R. 14a)

* * * * * * *

"The Witness (Continuing): In standing upon scrap metal in the area in which you cannot see, you can't get no proper—say how you are standing. You (123) are trying to make your foot as secure as you possibly can. Therefore I cannot say my feet was on here or there or what.

The Court: All right. That is an answer." (R. 15a)

* * * * * *

"[141] Re-direct Examination by Mr. Behrens:" (R. 103a)

* * * * * *

"Q. Now, then, about the scrap metal on the deck, that you told these lawyers about, Mr. Mosley, could you actually see what was under your feet as you stood there pulling on this hook? A. No, sir.

Q. Why couldn't you see what was under your foot? A. It was dark there.

Q. What made it dark at that point? A. With the metal that was placed in the center of the hatch.

Q. In the center of the hatch? A. Yes, sir; over the beams, over the lower hold, which we pile up about three and a half or four feet. That obstructed the view. I couldn't see anything there.

Q. I see. And you have told us there is no [144] artificial light down in this hold. A. None whatsoever." (R. 104a)

* * * * * *

Re-cross.

"[243] And when the chute was moved for the second shot, did you observe where the cargo fell when it came down the chute? A. We could see—I could only see to a distance of about where it was landing, because it was dark back there. We was using mostly sound, because you can't see.

Q. You mean you were depending on sound? [244] A. That is the only way you can go by.

Q. To know where it was landing? A. That's right. That is the only thing you can do on that." (R. 129a)

On cross examination he demonstrated how it happened (R. 16a-17a; 102a).

His undisputed testimony established that each day, and on the morning when he was hurt, before he was hurt, there was an inspection by a mate of the vessel. He testified:

"[141] Re-direct Examination by Mr. Behrens:

Q. Mr. Mosley, Mr. Cichanowicz asked you some questions about mates on ships and damage to ships; do you remember those questions? A. Yes, sir.

Q. I would like to ask you a few about that. A. Yes, sir.

Q. When a vessel came to Lipsett for the purpose of loading a cargo of scrap metal, is there a custom and practice concerning going over that vessel and inspecting it before the loading began? A. There is a custom.

Q. And during the course of that routine inspection would one of the ship's officers be present? A. Yes, sir.

* * * * * *

Q. What was the purpose of that inspection? A. The purpose of that is to find out what damages was done before the ship come into port, before the loading.

Q. As the loading would go forward on any one of these ships you ever worked on, from time to time would mates come down into the hold to watch the loading? A. Yes, sir.

Q. That always took place, Mr. Mosley? A. Always, sir." (R. 103a)

* * * * * *

"Q. And you say that on the morning you were hurt, before you were hurt, there was a mate down in this 'tween deck? A. Yes, sir.

Q. Was there anything unusual about that? A. No, sir." (R. 104a)

. . . . . .

Re-cross.

"Q. I said, the people who would give you orders, [149] people whom you would listen to, would be employees of Lipsett Steel Products? A. Along with the mate of the ship.

Q. Pardon? A. Along with the mate of the ship, who had charge down below, who was looking after the operation.

Q. You mean that you would also listen to the mate of the ship? A. I have to, sir.

Q. And the fellow who, you would say, came down and checked to see if there was any damage? A. Yes, sir; that was the gentleman." (R. 105a)

Ernest Vogel, an expert witness called by plaintiff, testified that there was a custom and practice of merchant vessels to have portable lights which the ship would put high in the corners so as to come cross-wise down in the 'tween deck during loading such as described, and that the lights customarily installed in the 'tween deck were "Part of the ship's equipment" (R. 136a-139a).

Neither respondent introduced any testimony. Mr. Catoggio, trial counsel representing the impleaded stevedore, in his summation stated:

"Now we come down to the question of what, if anything, happened. What is this fellow's story? We are taking his story." (R. 147a)

Mr. Cichanowicz, trial counsel for the respondent shipowner, in his summation stated:

"He has a burden, and he has a heavy burden—in fact, we feel that he has not sustained that burden.

That is why we did not put on any witnesses. There was testimony in this case. We could have put on witnesses." (R. 157a)

The jury verdict therefore clearly established the lack of any lighting such as customarily used on such loading work in the darkened 'tween deck, and the failure to provide a proper and safe hook, and that an officer of the vessel, who was down there inspecting with a light shortly before petitioner's injury, as well as on the previous day, must have known these facts.

Judge Marshall's opinion holds that the evidence was sufficient to establish unseaworthiness by reason of lack of adequate lighting, but that the hook must be considered as a separate and isolated "alternate" ground, such as to support "a finding of unseaworthiness *solely* upon the condition or fitness of the hook" (R. 174a; Appendix, *infra*, p. 31), and that the evidence "was plainly inadequate to support a finding that it was unseaworthy because of the condition of the hook" (R. 170a; Appendix, *infra*, p. 27). Judge Friendly additionally expressed "doubt" whether the evidence as to the lighting sufficed to warrant submission to the jury at all (R. 175; Appendix, *infra*, p. 32). Judge Clark, dissenting, points out that the two judges "never do make clear the basis for their decision or indeed what further or other evidence they think the plaintiff should have produced" (R. 177a; Appendix, *infra*, p. 34).

Reasons for Allowance of the Writ

I. "Special and important reasons for the grant of certiorari" exist because the Court of Appeals by its reversal has deprived petitioner of a judgment entered upon the verdict of a jury awarding petitioner damages for personal injury caused by unseaworthiness of the vessel; and certiorari should be granted for this Court to con-

sider whether the decision below improperly invaded the function and province of the jury (*Rogers* v. *Missouri Pac. R. Co.*, 352 U. S. 500, 510; *Gallick* v. *Baltimore & Ohio Railroad Co.*, 371 U. S. ; 83 S. Ct. 659; 9 L. ed. 2d 618; *Atlantic & Gulf Stevedores Inc.* v. *Ellerman Lines*, 369 U. S. 355, 359, and cases cited).

In *Rogers* v. *Missouri Pac. R. Co.*, *supra*, this Court said:

> "Special and important reasons for the grant of certiorari in these cases are certainly presented when lower federal and state courts persistently deprive litigants of their right to a jury determination." (352 U. S. 510)

At the present term of this Court, in *Gallick* v. *Baltimore & Ohio Railroad Co.*, *supra*, decided February 18, 1963, where an Ohio state Court of Appeals had reversed a judgment rendered on a jury verdict for plaintiff for personal injuries caused by being bitten by an insect while working near a fetid pool on respondent's property, this Court granted certiorari and reversed, saying:

> "This Court granted certiorari, 369 U. S. 848, to consider the questions of whether the decision below improperly invaded the jury's function."

In *Harrison* v. *Missouri Pac. R.R. Co.*, 83 S. Ct. 690; 9 L. ed. 2d 711, decided February 25, 1963, where an Illinois trial court had set aside a jury verdict for plaintiff, a section foreman who had been assaulted by a section hand, and the Appellate Court of Illinois had affirmed, this Court granted certiorari and reversed *per curiam* and said:

> "We think that the Illinois Courts improperly invaded the function and province of the jury in these cases."

In *Basham* v. *Pennsylvania R. R. Co.* 10 L. ed. 2d 80, 83 S. Ct. ——, decided April 15, 1963, where a New York

trial court had set aside a jury verdict for plaintiff, a car repairman employee of the railroad; and the New York Appellate Division (10 A. D. 2d 948) and Court of Appeals (11 N. Y. 2d 991) had affirmed without opinion, this Court granted certiorari and reversed, saying:

> "This Court granted certiorari, 371 U. S. 860, to consider the propriety of the trial court's action."

While the *Rogers*, *Gallick*, *Harrison* and *Basham* cases, involved the Federal Employer's Liability Act, this Court in *Atlantic & Gulf Stevedores Inc. v. Ellerman Lines*, *supra*, 369 U. S. 355, 359, 360, held that the same principle applied under the Seventh Amendment where, in an action to which the Federal Employers Liability Act was inapplicable, a judgment had been rendered on a jury verdict awarding a longshoreman damages against a shipowner, but disallowing recovery by the shipowner against the stevedore, and the latter had been reversed by the Court of Appeals. This Court said:

> "We might agree with the Court of Appeals, had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that, 'no fact tried' by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.
>
> "As in cases under the Jones Act, 46 U.S.C.A. § 688 (*Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523; *Senko* v. *La Crosse Dredging Corp.*, 352 U. S. 370), and under the Federal Employers Liability Act, 45 U.S.C.A. §51 et seq. (*Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29; *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, 653; *Dice* v. *Akron, C. & Y. Co.*, 342 U. S. 359; *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500), trial by jury is part of the remedy. Thus the provisions

> of the Seventh Amendment, noted above, are brought into play."

Clearly, therefore, the special and important reasons stated for the grant of certiorari in the *Rogers, Gallick, Harrison, Basham* and similar cases exist equally here where the petitioner was a longshoreman when injured and has been deprived by a Court of Appeals of a judgment entered upon a jury verdict awarding him damages for personal injuries caused by unseaworthiness of the vessel; and a writ of certiorari should be granted to determine whether the decision below has improperly invaded the jury function.

II. Clearly, the reversal herein violates the Seventh Amendment and conflicts with decisions of this Court which have held that lower court decisions invaded the function of the jury.

Except for the fact that the verdict involves unseaworthiness, the decision of the Court of Appeals herein is remarkably similar to the Court of Appeals decision in *Gallick* v. *Baltimore & Ohio R. R. Co.*, 173 N. E. 2d 382, where the Court of Appeals pointed out at page 384 that

> "The trial of Mr. Gallick's action against B. & O. Railroad Company proceeded upon two claimed grounds of negligence."

At page 388, the Court reasoned that:

> "If the plaintiff's case is to be sustained, *we* must *infer* that the undescribed (except as to size and biting quality) insect or bug had been attracted to the area in which the plaintiff was hurt by the stagnant pool, and that its bite caused the plaintiff's condition; that the pool created conditions and influences which helped to incubate or furnish an environment for the bug, whose bite was poisonous to the plaintiff; *or*, that the insect, having travelled from other areas, became con-

taminated or infected by the pool with a substance injurious to man, and that this substance infected the plaintiff when bitten.

. . . . . .

"Whether the insect causing the damage had any connection with the pool of stagnant water on the defendant's premises, *or* whether it came from the nearby, putrid mouth of the Cuyahoga River, *or* from weeds, *or* unsanitary places situated on property not owned or controlled by the railroad, presents only a series of guesses and speculations, which speculations make a chain of causation too tenuous to support a conclusion of liability on the part of the railroad." (Italics ours).

This Court in reversing that decision held that "the Court of Appeals improperly invaded the function and province of the jury", and that:

"The Court of Appeals erred in demanding either 'direct evidence that the existence of the unidentified bug at the time and place had any connection with the stagnant and infested pool' or else more substantial circumstantial evidence than that adduced here 'that the pool created conditions and influences which helped to incubate or furnish an environment for the bug . . . or that the insect, having travelled from other areas, became contaminated or infected by the pool'."

This Court thus rejected emphatically the Court of Appeals holding respecting what might or must be inferred, and the reasoning of the Court of Appeals as to what must be established by direct evidence. Yet, far more was there involved in inference than either Judge Marshall or Judge Friendly have indicated herein. The point emphatically made by this Court in the *Gallick* decision is that *the inferences are to be made by the jury, and, when made by a jury, its conclusions may not be reexamined as respects their soundness.*

This Court, in its *Gallick* opinion, quoted from *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 35, that:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences."

and that when a jury has drawn a conclusion of fact,

> "That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

If we might assume, or if this Court should hold herein, that Judges Marshall and Friendly were correct in holding that the hook must be considered as a separate and isolated "alternate" ground such as to support "a finding of unseaworthiness *solely* upon the condition or fitness of the hook" alone (R. 174a; Appendix, *infra*, p. 319), petitioner's undisputed description of the hook, and his undisputed testimony that it slipped off, causing him to fall backward, fully support an inference that the hook was unsafe and improper as a tool for the use of a longshoreman required to remove scrap caught in a chute down in the 'tween deck. The evidence was far more complete and direct than that in the *Gallick* case.

As said in *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, "the jury . . . could conclude that petitioner had been furnished no safe tool to perform his task." As said in *Jacob* v. *City of New York*, 315 U. S. 752, where petitioner's suit was "for personal injuries sustained when he fell because the wrench he was using to tighten a nut slipped under the torque applied to it", it "was for the

jury to decide whether a monkey wrench was a reasonably safe and suitable tool for petitioner's work".

In *Michalic* v. *Cleveland Tankers Inc.*, 364 U. S. 325, 330, this Court said:

> "True, there was no direct evidence of play in the jaw of the wrench, as in *Jacob* v. *New York City*, 315 U. S. 752, 754. But direct evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 508, n. 17."

These cases apply equally as respects the jury's function and the sanctity of its conclusions whether the fact be negligence or unseaworthiness. Indeed, as appears from the quotation from *Atlantic & Gulf Stevedores Inc.* v. *Ellerman Lines, supra*, 369 U. S. 355, 359, 360, involving a longshoreman's injury, this Court cited, among others, both the *Tennant* case and *Rogers* v. *Missouri Pacific R. Co.*; and the *Atlantic* case, in turn, is cited in the *Gallick* case, *supra*.

If, therefore, the case depended upon the right of the jury to infer or make its conclusion of unseaworthiness "solely" from the evidence as respects the hook "alone", as held by Judges Marshall and Friendly, the evidence would amply support a conclusion that the shipowner failed to furnish petitioner a safe tool to perform his task.

But in reality it was erroneous for Judges Marshall and Friendly to hold that the hook must be considered as an "alternate" ground, to support a finding "*solely* upon the condition or fitness of the hook".

In *Wilkerson* v. *McCarthy*, 336 U. S. 53, 63, this Court said:

> "In reaching its conclusion as to negligence, a jury is frequently called upon to consider many separate strands of circumstances, and from these circumstances to draw its ultimate conclusion on the issue of negligence."

Similarly, as to unseaworthiness, in *Mocles* v. *City of Galveston*, 370 U. S. 165, 170, this Court, with many citations to illustrate the point, said:

> "A vessel's unseaworthiness might arise from any number of individualized circumstances."

In *Tiller* v. *Atlantic Coast Line*, 323 U. S. 574, 576, cited by Judge Marshall (R. 170a), this Court overruled a holding below that amending the complaint to plead the Boiler Inspection Act introduced "a new item of negligence which was submitted to the jury as an alternative ground of recovery".

In *Atlantic & Gulf Stevedores Inc.* v. *Ellerman Lines*, *supra*, 369 U. S. 355, 361, 363, the lower court had held that "the jury had been charged too restrictively, that their attention had been called only to the manner of using the hook" (p. 361); but this Court held that by the charge "it included *the totality of the circumstances*" (p. 363) and for this reason approved the charge. It held, moreover, that because of the three possible grounds for the verdict in favor of the longshoreman against the shipowner, one might be for original unseaworthiness—"defective bands"—for which the stevedore would not be at fault, a verdict in favor of the stevedore would not be disturbed. By contrast, in *Weyerhaeuser SS Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 568-569, the error was that "It was improper, therefore, for the court to direct a verdict for respondent" instead of having the jury render its own verdict.

In *Ross* v. *Steamship Zeeland*, 4 Cir., 240 F. 2d 820, cited by Judge Marshall (R. 172a), a coil of wire for no apparent reason was near a ladder where the lighting was inadequate, and it was held that "That fact, coupled with the lack of adequate lighting in the 'tween deck, rendered the ship unseaworthy" (p. 822).

Judges Marshall and Friendly have misunderstood and misapplied *United New York and New Jersey Sandy Hook*

Pilots Association v. *Halecki*, 358 U. S. 613. Two employees of a specialized subcontractor went aboard to clean the generators with carbon tetrachloride while the vessel was being overhauled by a contractor at a shipyard in New Jersey. They were, therefore, not entitled to any warranty of seaworthiness. The jury, however, had been charged that they might recover for unseaworthiness without proof of negligence, or might recover for proven negligence. It was for this reason that this Court stated that "there is no way to know that the invalid claim of unseaworthiness was not the sole basis for the verdict."

Here, by contrast, the lack of lighting and the quality of the hook were related, much as were the poorly lighted working space and the defective wrench in *Michalic* v. *Cleveland Tankers Inc.*, 364 U. S. 325.

Moreover, neither of the respondents herein at any time requested any charge or made any motion to require the issue of unseaworthiness by reason of the hook to be determined apart from unseaworthiness by reason of the inadequate lighting; nor did either of them request special findings. As said in *Atlantic & Gulf Stevedores Inc.* v. *Ellerman Lines, supra*, 369 U. S. 355, 363, "On the issue of . . . liability his charge was no more precise than has been indicated. Yet respondents did not ask for more on this phase of the controversy".

Judge Marshall's argument that petitioner's testimony did not establish "that the origin or ownership of the hook could be attributed to either Adra or Lipsett", and Judge Friendly's argument that petitioner did not prove "that the SS Turmoil did not have adequate portable lights at *Lipsett's* disposal", both violate this Court's decisions respecting unseaworthiness. *Mahnich* v. *Southern SS. Co.*, 321 U. S. 96, firmly established that unseaworthiness is determinable by what is made available to the man. *Michalic* v. *Cleveland Tankers Inc.*, 364 U. S. 325, 327, 328, citing with approval *Cox* v. *Esso Shipping Co.*, 5 Cir., 247 F. 2d 629, established that the seaman or longshoreman is

not burdened with selecting proper tools. *Alaska SS Co.* v. *Petterson*, 347 U. S. 396, established that relinquishment of control does not relieve the shipowner of his obligation. *Mitchell* v. *Trawler Racer Inc.*, 362 U. S. 539, 549, establishes that temporary unseaworthiness will support recovery. *Salem* v. *United States Lines*, 370 U. S. 31, establishes that further or expert testimony respecting the appliances was not necessary.

Here (1) the hook used was on board, and certainly the jury was entitled to infer that it was there for petitioner's use; (2) no other or safe hook or tool was provided; and (3) lights were not made available to the man. The jury was fully warranted in holding that these circumstances rendered the vessel unseaworthy, and such was the proximate cause of petitioner's injury.

As stated by Judge Clark in his dissent (R. 177a; *infra*, p. 34) "this is yet another instance where my brothers *determinedly deny the benefits of trial by jury*"—a matter which as this Court has repeatedly held, presents "special and important reasons for the grant of certiorari" (See pp. 12-13, *supra*).

CONCLUSION

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted,

EDWARD J. BEHRENS,
CHARLES H. LAWSON,
70 Pine Street,
New York, N. Y.
and
CHARLES A. ELLIS,
42 Broadway,
New York 4, N. Y.
Counsel for Petitioner.

APPENDIX

Judgment of the Court of Appeals.

(R. 178a)

UNITED STATE COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of February one thousand nine hundred and sixty three.

Present: HON. CHARLES E. CLARK,
HON. HENRY J. FRIENDLY,
HON. THURGOOD MARSHALL,
Circuit Judges.

[SAME TITLE]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for a new trial in accordance with the opinion of this court with costs to the defendant-appellant, Gia. Mar. Adr. S.A.

A. DANIEL FUSARO
Clerk.

Appendix.

Opinions of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 78—October Term, 1962

(Argued October 31, 1962 . Decided February 28, 1963)

Docket No. 27651

SAMUEL MOSLEY,

Plaintiff-Appellee,

against

CIA. MAR. ADRIA, S.A.,

Defendant-Appellant and Third Party Plaintiff-Appellee,

against

LIPSETT STEEL PRODUCTS, INC.,

Third-Party Defendant-Appellant.

Before:

CLARK, FRIENDLY and MARSHALL, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Cooper, *J.*, awarding plaintiff-longshoreman $80,000 against defend

ant-shipowner and awarding defendant-shipowner $80,000 indemnity against third-party stevedoring contractor. Reversed and remanded.

EDWARD J. BEHRENS, New York, N. Y. (Gay & Behrens, on the brief), (Charles H. Lawson, of counsel) *for Plaintiff-Appellee.*

VICTOR S. CICHANOWICZ, New York, N. Y. (Cichanowicz & Callan, on the brief) *for Defendant Appellant and Third-Party Plaintiff-Appellee.*

VINCENT A. CATOGGIO, New York, N. Y. (Purdy, Lamb & Catoggio, on the brief) *for Third-Party Defendant-Appellant, Lipsett Steel Products, Inc.*

MARSHALL, *Circuit Judge*:

This is an appeal by the defendant, Cia Mar Adra, S.A., and the third-party defendant, Lipsett Steel Products, Inc., from a judgment of $80,000 entered in favor of the plaintiff, Samuel Mosley, in the United States District Court for the Southern District of New York after a trial before Judge Cooper and a jury.

Mosley is a longshoreman who was injured on October 15, 1956, while engaged in loading a cargo of scrap metal aboard the foreign flag ship S.S. Turmoil, which lay moored in Port Newark Bay, N. J. He brought suit against Adra, owner and operator of the vessel, alleging in his complaint two causes of action, one based upon negligence and the other upon unseaworthiness. Adra then filed a third-party complaint against Lipsett, the stevedoring contractor which employed Mosley, seeking indemnity from Lipsett for any

recovery which Mosley might have. *Cf. Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U. S. 124 (1956). At the close of plaintiff's case, the trial judge directed a verdict in favor of Adra against Mosley on the cause of action based upon negligence. He declined to direct a verdict on the cause of action based upon unseaworthiness, however, and that issue was submitted to the jury. The jury returned a general verdict of $80,000 in favor of Mosley against Adra on the original complaint and in favor of Adra against Lipsett for indemnity in the same amount on the third-party complaint.

Adra appeals from plaintiff's judgment on the original complaint, urging in the alternative that if the judgment is affirmed, the judgment on the third-party complaint awarding it indemnity against Lipsett also be affirmed. Adra also contends that the trial judge erred in refusing to amend its judgment against Lipsett to include an award for counsel fees, disbursements, and costs required for the defense of the case. Lipsett appeals from the judgments on both the original complaint and on the third-party complaint. Mosley, relying upon his judgment on the unseaworthiness count, has not appealed from the action of the trial judge in directing a verdict against him on the negligence count.

Because Mosley was working alone in the 'tween deck at the time he was injured and because both Adra and Lipsett rested at the conclusion of plaintiff's case without putting in any evidence of their own, the description of the accident which was before the jury came solely from Mosley. He testified that his job in the 'tween deck was to direct the placing of a steel chute after each "shot" of scrap metal was dumped down it; when one area of the 'tween deck became filled with scrap metal, he would direct the chute toward another area in order to insure an even distribution of the cargo. At the close of the day prior to the accident, a load of scrap metal had been placed in the

square of the hatch of the 'tween deck to a height of three-and-a-half or four feet, partially blocking the entry of natural light into the 'tween deck.

Mosley reported for work the following morning at his usual hour of shortly before eight o'clock, set up the chute, and participated in the completion of the first shot. The accident occurred at nine-thirty or ten o'clock during the loading of the second shot. At the time, Mosley testified, there was neither natural light at the spot where he was injured nor artificial light anywhere in the 'tween deck. An expert witness for the plaintiff testified that it was the custom and practice for merchant vessels to carry portable lights as part of their normal equipment and to use them in the 'tween deck when the natural light was not sufficient. There was no evidence that the S.S. Turmoil possessed such lights or that, if it did, Mosley asked that they be installed or turned on.

During the course of the loading of the second shot, a piece of metal—though by Mosley to be "a piece of rear end of some sort of a car transmission"—became lodged or wedged about three feet from the mouth of the chute, blocking the free flow of scrap metal. Mosley was standing at the time about twenty feet from the chute. He told the foreman to suspend the loading operation so that he could free the obstructing piece of metal. Then, he said, he "reached in the back of me, which I have a hook" that he intended to use in clearing the chute. The hook was not introduced into evidence; Mosley described it as a large piece of iron, like a pipe, three-quarters of an inch thick and five or six feet long, fashioned at each end "into a round shape, in the order of a walking-cane handle"—"one this way, one out." He said it was not a manufactured instrument, but had been picked up out of the scrap metal and improvised into its present form. No evidence was introduced as to who owned the hook or who furnished it to Mosley.

"Equipped with the hook, Mosley approached to within four or five feet of the chute and stationed himself on pieces of "portions" of scrap metal that had been loaded on the deck, attempting to make sure that he had "the very best [footing] I possibly could" under the circumstances. Then, he told the court, "I taken my hook, fastened it around the top of this metal, and I went to pull upon this hook in order to remove this piece of metal out of there, but in so doing, pulling as hard as I did, my feet begin to slip, and as I started to slip the hook slipped off and I fell." He said his feet were caused to slip by the "metal that I was standing upon on deck." Because of the absence of light, Mosley said, the "tween deck was dark and "I couldn't see anything there," including the metal that was underfoot.

> "Mosley: Well, first when you are working under something, you cannot see, you would take and set your feet as best you possible can, whatever you are standing on.
>
> The Court: Yes, I know, but he [counsel] wants to know on this particular occasion how did you set yourself.
>
> Mosley: I set myself on this particular occasion, as best I could with the footing, with the metals under my feet, to get a proper [secure], so as to have a foundation to stand upon to pull this stock off.
>
> . . . .
>
> In standing upon scrap metal in the area in which you cannot see, you can't get no proper [see how you are standing. You are trying to make your foot as secure as you possibly can. Therefore I cannot say my feet was on here or there or what."

He admitted that he "definitely" knew that he was standing on "some sort of scrap" and could feel it under his

feet. But he did not try to scrape any of the metal away, he said, because "you can't scrape much metal away" and "to scrape all that metal out of there would take about five minutes, because you are loading scrap metal."

Mosley fell backward and felt pains in his neck, back, legs, hands, and right thigh; subsequently, in 1957, he underwent a cervical laminectomy to remove an obstruction in his back created by a ventral herniated disc. He has not worked since.

We deal first with the question of the validity of Mosley's judgment against Adra on the unseaworthiness count because, as we shall indicate, we find it dispositive of all the issues raised on this appeal.

The factual theory by which Mosley sought to establish the unseaworthiness of the S. S. Turmoil was not precisely outlined at trial. In his brief on appeal, however, he relies upon two alternate grounds as supporting the judgment of the District Court. These grounds are (1) that "he was working in semi-darkness and could not see even the type of scrap upon which his feet were placed," and (2) that "the hook was improvised and peculiar with a tendency to destroy the normal line of force and not suited to the task." He underscores his reliance upon these two grounds by saying at another point in his brief, "Mosley's injury was caused by absence of light or the odd hook, or both."

That these two grounds were understood by the jury as being important to plaintiff's case and offering alternate bases of recovery seems apparent from the transcript. Mosley was questioned on direct examination and on cross-examination as to both the adequacy of the lighting and the quality of the hook. Counsel for Mosley, counsel for Adra, and counsel for Lipsett each undertook in his summation to the jury to address himself to the relevance and force of the evidence adduced on both grounds. And the District Judge, in charging the jury on unseaworthiness,

indicating his understanding that plaintiff was relying upon both grounds, by saying:

> "What were the conditions aboard the vessel at the time of the accident, and how did they compare with the standard which the law imposes.
>
> Was the lighting adequate?
>
> What about the hook with which the testimony deals?"

The District Judge did not mention the hook at any other point in the charge, nor did he make any effort to relate this statement to the governing principles of unseaworthiness.

Because the jury's verdict was a general one, it is not possible to know upon which of these two alternate grounds it predicated the finding of unseaworthiness necessary to support Mosley's verdict against Adra. In these circumstances it is the duty of an appellate court to examine the adequacy of both grounds. *Stokes* v. *United States*, 264 Fed. 18, 23 (8 Cir. 1920); *Atlantic Coast Line R. R. Co.* v. *Tiller*, 142 F. 2d 718, 722 (4 Cir. 1944), *reversed on other grounds*, 323 U. S. 574 (1945). If one of the grounds is found adequate and the other inadequate as a matter of law, the judgment must necessarily be reversed since "there is no way to know that the invalid claim of unseaworthiness was not the sole basis for the verdict." *United New York and New Jersey Sandy Hook Pilots Association* v. *Halecki*, 358 U. S. 613, 618 (1959).

We have undertaken that examination and concluded that although the evidence presented in the District Court may have been adequate to support a finding that the S. S. Turmoil was unseaworthy because of the condition of the lighting, it was plainly inadequate to support a finding that it was unseaworthy because of the condition of the hook. Accordingly, the judgment in favor of Mosley must be reversed and the case remanded for a new trial.

Appendix.

Under legal principles now well established, a ship and its owner are liable to indemnify a seaman for an injury caused by the unseaworthiness of the vessel or its appurtenant appliances and equipment. *The Osceola*, 189 U. S. 158 (1903); *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96 (1944). See Note, 76 Harv. L. Rev. 819 (1963). The shipowner's absolute duty to furnish and maintain a seaworthy vessel is owed not only to seamen but also to longshoremen and stevedores employed by someone other than the shipowner who are injured in the course of their employment aboard the vessel while "doing a seaman's work and incurring a seaman's hazards." *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 99 (1946); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953); *Crumady* v. *The "Joachim Hendrich Fisser"*, 358 U. S. 423 (1959). "Moreover, a shipowner is not relieved of his obligation to provide a seaworthy vessel by the fact that the appurtenant appliances and equipment which are used in the work and cause the injury are supplied by the stevedoring contractor. *Alaska S. S. Co.* v. *Petterson*, 347 U. S. 396 (1954); *Rogers* v. *United States Lines*, 347 U. S. 984 (1954); *Mascuilli* v. *C. A. Larsen Navigation Corp.*, 298 F. 2d 220 (2d Cir. 1962). But the shipowner's duty to furnish a seaworthy ship is not a duty to furnish an accident free ship; "it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use." *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 550 (1960). Thus, the concept of the unseaworthiness of a ship is a relative one dependent for definition in each instance upon the circumstances in which her fitness is drawn into question. It is against these principles that the evidence introduced at the trial court in the present case must be measured.

The first of plaintiff's attempts to establish the unseaworthiness of the S. S. Tremont was based upon his testimony that the sweep deck to which he was assigned to work

was dark or semi-dark because of inadequate illumination. If the jury believed Mosley's testimony, we have no doubt that it could be permitted to conclude that a ship without adequate lighting is not reasonably fit to permit a longshoreman to perform the task of loading cargo with reasonable safety and therefore is unseaworthy. So much was held in *Mollica* v. *Compania Sud-Americana de Vapores*, 202 F. 2d 25 (2 Cir. 1953), in which this court stated, "It cannot be gainsaid that a ship is unseaworthy for loading if, and when, adequate lights to make the work reasonably safe are lacking in the part of the ship being loaded." *Id.* at 27. Although that decision rests upon a doctrine of control which is no longer viable, its rationale of the content of the doctrine of unseaworthiness retains its vitality. *Grillea* v. *United States*, 232 F. 2d 919, 922 (2 Cir. 1956), as subsequent holdings that the absence of adequate lighting can render a ship unseaworthy demonstrate. *E.g.*, *Pagano* v. *United States*, 168 F. Supp. 793 (E. D. N. Y. 1958); *cf. Blankenship* v. *Ellerman's Wilson Line New York, Inc.*, 265 F. 2d 455 (4 Cir. 1959); *Ross* v. *Steamship Zeeland*, 240 F. 2d 820 (4 Cir. 1957).

We are less certain, however, as to whether a jury could be permitted to conclude on the evidence presented below that the absence of lighting was the proximate cause of plaintiff's injuries. We recently approved an instruction that proximate cause requires "an unbroken chain of events flowing from the unseaworthiness or negligence and leading to the injury." *Bliss* v. *United States Lines Co.*, 286 F. 2d 920, 925 (2 Cir. 1961). In view of Mosley's testimony that he was aware he was standing on scrap and that he knew his footing was insecure, the question of whether such an "unbroken chain" could reasonably be found to have existed between the inadequate lighting and the eventual injury is not free from doubt. But we need not decide that here because, even assuming a jury could be

permitted so to find, it could not be permitted to find that the plaintiff had established as an alternate ground of unseaworthiness a defect in the hook.

It is true that a shipowner can be held liable for failure to meet this duty to provide a seaworthy ship solely because an appurtenant appliance brought on board by the stevedore is not reasonably fit for its intended use, *Alaska Steamship Co.* v. *Petterson*, *supra*, and that an unsafe cargo hook can be the basis for such a holding. *De Van* v. *Pennsylvania R. R. Co.*, 167 F. Supp. 336 (E. D. Pa. 1958). But the existence of this principle of law does not relieve the plaintiff of this burden of demonstrating by a preponderance of the credible evidence that the appliance or tool which he claims caused his injury was an appurtenance of the ship, *cf. Sherbin* v. *S. G. Embiricos, Ltd.*, 200 F. Supp. 874 (E. D. La. 1962), and that it was not reasonably fit for its intended use. Mosley failed to meet that burden in the present case.

Although he was examined in some detail with respect to the hook, Mosley's testimony does not give an adequate basis for the suggestion, far less the conclusion, that the origin or ownership of the hook could be attributed to either Adra or Lipsett. Mosley was asked on direct examination:

> "Q. Do you know where it [the hook] came from? A. No, I do not."

He was asked on cross-examination:

> "Q. In other words, it wasn't something that was manufactured and given to you to use on the ship, is that correct? A. That is correctly.
>
> Q. It was picked up out of the scrap metal and somebody fashioned a hook out of the end, and that is what you used? A. Yes, sir."

His reference to the hook as "my hook" at another point in the examination is not probative, of course, of who gave him the hook, particularly in light of his answers that he did not know where the hook came from, that it was not given to him to use on the ship, and that it was an improvised rather than a manufactured product.

Even assuming *arguendo*, however, that the jury reasonably could have found that the hook was an appurtenance of the ship, Mosley failed to put in any proof that the hook was defective, worn, weakened, broken, improperly designed, insufficiently strong, excessively old, or in any other way unfitted or unsuited for its intended use. See *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325 (1960). The most that Mosley proved was that the hook slipped while being used. But, as we have many times said, the mere fact that an accident occurs and a seaman is injured while using an appurtenance in the performance of his duties cannot, without more, establish that a vessel is unseaworthy. *Nuzzo* v. *Rederi A/S Wallenco, Stockholm, Sweden*, 304 F. 2d 506 (2 Cir. 1962); *Puddu* v. *Royal Netherlands Steamship Co.*, 303 F. 2d 752 (2 Cir. 1962); *Ezekiel* v. *Volusia Steamship Co.*, 297 F. 2d 285 (2 Cir. 1961); *Richter* v. *Mathiasen's Tanker Industries, Inc.*, 297 F. 2d 494 (2 Cir. 1961).

Because of this failure of proof, a jury would not be permitted to base a finding of unseaworthiness solely upon the condition or fitness of the hook. The fact that the jury returned a general verdict leaves fully open the possibility that this is precisely what it did. In these circumstances, we have no choice under the principles of appellate review recited above but to reverse Mosley's judgment against Adra and remand for a new trial.

This disposition of Adra's appeal from the judgment in favor of Mosley makes it unnecessary for us to consider the issues raised by Lipsett's appeal from the judgment

for indemnity in favor of Adra or by Adra's additional appeal from the trial court's refusal to amend its indemnity judgment to include an award for counsel fees.

Reversed and remanded.

FRIENDLY, *Circuit Judge*, concurring:

I am in full accord with my brother Marshall that we must reverse for error in the charge with respect to the hook; indeed, as I read the charge, the jury could well have understood it to warrant their finding unseaworthiness on the basis not only of a defect in the hook but also of one in the stow, although at the argument before us plaintiff's counsel conceded that on the facts here the ship was not chargeable for any defect in the last. My doubt is whether plaintiff's evidence as to the lighting sufficed to warrant submission to the jury at all. No one can quarrel with the general proposition that proof of inadequate lighting is enough to support a finding of unseaworthiness. But here plaintiff's expert testified there was "a custom and practice" to have portable lights as part of a ship's equipment and

> "When there was not sufficient light in the lower hold or in the 'tween decks, we had the ship put lights in the corners, so to come cross-wise down in the hold or in the 'tween deck, so the people would see that the stowing would be done properly."

This evidence would seem to demand a further showing that the S. S. Turmoil did not have adequate portable lights at Liguett's disposal; if she did, I would think that, on plaintiff's own theory, there was nothing to warrant the conclusion that she was unseaworthy. *Mollica v. Compania Sud-Americana de Vapores*, 267 F. 2d 25, 12 Cir.

1953), is still viable to the extent that if a vessel has all necessary appliances available, she is not to be cast for unseaworthiness simply because those doing the work do not use them, whether such person be a stevedore here, or a seaman as in *Ezekiel v. Volusia SS. Co.*, 297 F. 2d 295 (2 Cir. 1961), cert. denied, 369 U. S. 843 (1962). None of the cases cited by my brother Marshall is *contra*. There was no clear evidence that portable lights were not available; the closest plaintiff came to proving this is some testimony that an officer of the vessel made an inspection of the 'tween-deck with a flashlight to see whether any damage to cables was being done. The remand will permit a fuller exploration of these facts and submission of the case to the jury on instructions that will focus attention more precisely on the issue really in dispute, 28 U. S. C. § 2106. Further delay in the disposition of Mosley's claim against the ship is, indeed, unfortunate, but other remedies have been available to him in the meantime.

CLARK, *Circuit Judge* (dissenting):

Study of the record convinces me that no error prejudicial to the defendants occurred in the trial and that the plaintiff's verdict and judgment should be affirmed. Indeed, the only question which might give me pause is as to the action of the trial judge in taking the issue of negligence from the jury—a course which suggests a sharper differentiation between the correlative concepts of negligence and unseaworthiness than the modern precedents appear to support. But if there were error here, it was in the defendants' favor and hence gives no basis for reversal on their appeal.

For the rest, Mosley's own testimony (the only evidence bearing on the accident) gave convincing support to the

two claims of inadequate lighting and improper appliances — both classic instances of unseaworthiness, as indeed the opinion demonstrates with ample citations. Mosley testified as to the difficulty of seeing the metal wedged in the chute because of the darkness and his inability to dislodge it with the improvised scrap metal hook which was his only tool. That then he slipped while standing on scrap and trying thus unsuccessfully to clear the chute would seem to present an obvious case for the jury to decide. My brothers are hard pressed to find grounds for taking these issues from the jury, and never do make clear the basis for their decision or indeed what further or other evidence they think the plaintiff should have produced. It is now well settled, contrary to earlier views, that a claimant need not produce expert testimony as to the inadequacy of the ship's equipment, but the jury may make obvious deductions from the nature of the accident. *Salem* v. *United States Lines Co.* 370 U. S. 31, reversing a decision of this court, made that quite clear. In the light of the *Salem* principle I see no basis for ruling as a matter of law either that the appliance was adequate or that proximate cause was lacking. As we have recently held, "[t]he burden of selecting proper tools is not upon the seaman." *Street* v. *Isthmian Lines*, 2 Cir., Jan. 30, 1963.

Regretfully I must conclude that this is yet another instance where my brothers determinedly deny the benefits of trial by jury to Jones Act plaintiffs. See citations in my dissents in *Walters* v. *Moore-McCormack Lines*, 2 Cir., Jan. 14, 1963, and *Nuzzo* v. *Rederi, A/S Wallenco, Stockholm, Sweden*, 2 Cir., 304 F. 2d 506, 511, 514.

I would affirm.

Charge of the Court.

(465B)

The Court: (Cooper, J.) Members of the Jury:

We have now reached that point in the trial of this case where the matters in controversy are about to be submitted for determination by you.

In a sense this is a search in pursuit of truth. Every case on trial is very important under our law, both to the parties and to the community.

The presentation of the evidence in this case has been completed, the summations of the attorneys have been made and it now becomes your province to determine justice under law between the parties.

I want to thank you, too, and join counsel in their expressions of appreciation for the conscientious attention you have displayed throughout the proceedings.

As to counsel, I want to say that the parties to this action have been represented by earnest counsel who, in the conduct of the trial and in their summations, have with much skill urged the contentions and positions of their respective clients.

Under our system of jurisprudence the Court and jury have distinct and separate functions to perform, each independent of the other to a large degree. You are the sole and exclusive judges of the facts, and that (466) is your paramount function. You determine the weight of the evidence and the credibility of the witnesses and you resolve such conflicts as there may be in the testimony.

It is my function to instruct you as to the law that is applicable in this case. You are required under the law to accept these instructions as to law and to apply them to the facts as found by you. You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law, regardless of any opinion you may have as to what the law ought to be. It would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

In your determination of the facts you are to rely on your own recollection of the evidence. What I have said from time to time or what I may say in this charge, or what counsel may have said during the course of the trial or during their respective summations, is not to be taken in place of your own recollection of the facts or the evidence in the case.

What are the obligations and the duties of (467) the parties to this suit?

What were the conditions aboard the vessel at the time of the accident, and how did they compare with the standard which the law imposes.

Was the lighting adequate?

What about the hook with which the testimony deals?

Did the plaintiff himself exercise reasonable care under the circumstances? If he did not, is that the end of the case?

What really were Atra's responsibilities to the plaintiff under all the circumstances? And what about the obligation of Lipsett?

These are some of the many questions that must be in your minds.

Now, the evidence in the case consists of the sworn testimony of the witnesses, all the exhibits which have been received in evidence, all the facts which have been admitted or stipulated, as well as portions of the examination before trial which was read to you. You are to consider only the evidence in the case, but in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw

from facts which you find to (468) have been proved, such reasonable inferences as seem justified in the light of your own experience, and that priceless ingredient common sense.

During the course of the trial I have passed upon questions concerning the admissibility of evidence and upon certain motions. You are to draw no inferences from the Court's rulings with respect to the admission or rejection of evidence or the motions made by the parties. Such rulings relate exclusively to matters of law with which you have no direct concern, and they may in no way enter into your deliberations.

Any question as to which an objection was sustained by the Court and any evidence ordered stricken by the Court must be entirely disregarded.

You saw the witnesses on the stand. You observed their manner of giving testimony. What did you think? How did each witness impress you? Was he forthright? Did he appear to be testifying with candor? Or did he appear evasive and did he seek to avoid direct answers to questions?

Although a witness is presumed to speak the truth, this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony which he gives, or by contradictory evidence.

(469) Consider any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant

detail, and whether the discrepancy results from innocent error or from a wilful falsehood.

If you find the presumption of truthfulness to be rebutted by any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

I have the power under the law to comment upon the testimony. I shall not express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what inferences should or should not be drawn from the evidence. You are intelligent people. You don't need me to draw any inferences or to interpret (470) the evidence for you.

The parties to this action are of course entitled to even-handed justice. They stand equal before you. You must not allow sympathy or bias or prejudice to play any part in your determination of this case. The fact that Samuel Mosley is an individual and that the vessel owner and the stevedoring company are corporations should not influence your judgment in any way. Your duty is to try the issues fairly and impartially, and that is what you took an oath to do, exactly that.

There are only three parties which you as jurors will be concerned with in this case. They are the plaintiff, Samuel Mosley; the steamship owner, Adra, and the Lupsett Steel Products, Incorporated.

As I told you at the start of the trial we really have two separate cases before us and it is important to bear this in mind in your consideration of the issues. First, there is the action by a longshoreman named Mosley as a plaintiff against the defendant shipowner, which I shall refer to as Adra. Here Mosley seeks to recover damages for personal injuries which he claims to have sustained on October 15, 1956, while (471) engaged in loading scrap

metal on the vessel owned by Adra. You will observe that Adra is the sole defendant in this action, and that Mosley asserts no claim against Lipsett, his employer.

The second action is an independent action by Adra against Lipsett, and I will come to that later. But let us stick to the first action for the time being. It is advisable that we do so, because if you find that Adra is not liable in the first action, then this would dispose of the entire case, and there would be no occasion to consider Adra's independent claim against Lipsett.

As you know, Mosley was not an employee of Adra, but of Lipsett, the stevedoring firm engaged to load a cargo of scrap metal on the ship owned by Adra, and so in the first action Mosley's claim against Adra is founded upon an ancient doctrine of maritime law known as seaworthiness. Plaintiff asserts that his injuries resulted from the defendant Adra's failure to fulfill its obligation to provide a seaworthy vessel, including a place that is reasonably fit for the work to be performed. Mosley had a right to be on that vessel and he had a right to expect Adra to supply to him a seaworthy vessel.

What is a seaworthy vessel of course is a question of law which you must be very careful to understand. (372) I will come to that.

Adra, on the other hand, denies that the plaintiff's injuries were caused by a failure on its part to provide a seaworthy vessel, and in addition asserts as a separate defense that plaintiff's alleged injuries were caused in whole or in part by his own negligence. We will come to that, too, in due time.

You have heard the expression "burden of proof" which the plaintiff has. Let me direct your attention to it for the moment.

Does Mosley have to prove his claim against Adra by proof beyond a reasonable doubt? No. But the law provides that a plaintiff in a civil action, in order to recover,

the plaintiff in this action, for instance, has the overall burden of proving by a fair preponderance of the evidence his claim, one, that the vessel was unseaworthy; and, two, that such unseaworthiness was the proximate cause in whole or in part of the injuries he alleges he sustained.

Under the law the plaintiff is required to prove every essential element of his case by that measurement of a fair preponderance of the evidence. Hence, if you find that the proof fails to establish any of the essential elements of the plaintiff's (173) case by such a preponderance of evidence, you must then return a verdict for the defendant Xdra.

Now what do I mean by "a fair preponderance of the evidence"?

"A fair preponderance of the evidence" means the greater weight of the evidence. This is not necessarily determined by the greater number of witnesses testifying to a fact or state of facts, but merely means that the evidence on behalf of the person on whom the burden rests, namely, the plaintiff, must have greater weight in your judgment, greater probative value. In other words, it means that the evidence in favor of the party on whom the burden rests must have more convincing weight than that opposed to it.

By means of illustration your attention used will better bring out the meaning of this expression, "a fair preponderance of the evidence."

Assume an ordinary scale. You will then weigh the proofs that a value, of course, on the evidence. In order that the proof case made on one side of the scale the greater and have more confidence in favor of the plaintiff, and on the other side of the scale the greater and better evidence in favor of the defendant. In doing this you are to take into account the exhibits and the testimony and everything that I told you constitutes the evidence in the case.

If after considering all the testimony you are satisfied that the plaintiff's evidence, in terms of quality and credibility on each essential point as to which he has the burden of proof, outweighs that of the defendant, then the plaintiff has met the burden of proof cast upon him under law.

If after such consideration, however, you find the testimony of both parties equally weighted, or in balance, then the plaintiff has failed to sustain his burden of proof.

If you find the believable and credible testimony is weighted in favor of Adra, then, also, obviously, the plaintiff will have failed to have sustained his burden of proof.

It is proper to find that a party has succeeded in carrying the burden of proof of an issue of fact if after consideration of all the evidence in the case you believe that what is sought to be proved on that issue is more likely true than not true. However, mere speculation or conjecture cannot be supplied in the place of proof.

As I told you once before, a defendant is not (475) compelled to put on the witness stand any witnesses. Hence Adra's failure, or the failure on the part of Lipsett, to call any witnesses does not under law raise or create any inference adverse to either Adra or Lipsett.

Now as to this unseaworthiness that we have been talking about, the unseaworthiness which the plaintiff, you remember, under law must establish by a fair preponderance of the evidence.

Under the maritime law Adra, as shipowner, owed to Mosley the absolute duty to keep and maintain the ship and all decks, appliances, tools and equipment in the vessel in a seaworthy condition at all times. To be in a "seaworthy condition" means to be in a condition reasonably suitable and fit for the purpose or use intended. This applies to the various elements in this case, but I must emphasize that liability for an unseaworthy condition does not in any way depend upon negligence or fault or blame.

That is to say the shipowner or operator is liable for all injuries and consequent damage proximately caused by an unseaworthy condition existing at any time, even though the owner may have exercised due care under the circumstances, and even though the owner may have had no notice or knowledge of the unseaworthy condition which proximately caused the (476) damage.

The duty of a shipowner to supply a seaworthy vessel is absolute and non-delegable. That is, Adra cannot relieve itself of this duty by transferring or shifting the responsibility to another, provided, of course, Adra had as to this plaintiff an unseaworthy vessel, and that is for you to determine.

The duty which Adra owed to Mosley to provide him with a seaworthy vessel can be considered breached even though the alleged unseaworthiness may have been caused by the stevedoring company.

The fact that Mosley was an employee of Lipsett, the stevedoring company engaged in loading the cargo did not relieve Adra of its duty to supply Mosley with a seaworthy vessel, provided you find that issue, and that is another issue that is left with you. That is your responsibility.

And so the question of who creates the unseaworthiness condition is not a defense to a vessel owner if in fact you find the ship was unseaworthy. This is true even though the loading equipment and the tools may belong to the stevedoring company, and also if other inadequacies created by the stevedoring company, if you should so find, resulted in an unseaworthy vessel.

(477) You may not—I emphasize—you may not presume unseaworthiness from the mere fact that the plaintiff may have sustained injuries. Before the plaintiff may recover under this claim he must satisfy you by a fair preponderance of the evidence that, one the vessel was in truth and in fact unseaworthy at that time; under those circumstances;

two, that he has sustained injuries, and, three, that such unseaworthiness was the proximate cause of the injuries in question.

Bear in mind that a shipowner is not required or obligated to furnish a totally accident-free ship, a perfect ship. He is required to furnish a ship reasonably fit and in good order, including parts of the vessel necessarily used by workers aboard and in performance of their duties. The essential test is whether, considering the place and circumstances—not in some other case, in this case—the condition of the area, the lighting and equipment, were they or were they not reasonably fit to permit Mosley to perform his tasks with reasonable safety? That is for you to determine. And for this purpose you may take all the circumstances, including the duration of the conditions and the feasibility of more complete prevention into whatever account you think appropriate.

A vessel is not unseaworthy merely because some (478) imperfect condition may exist, if even so the vessel was reasonably safe and suitable and is reasonably fit for service as similar vessels in similar service.

Bear in mind that if you find that the vessel was unseaworthy, then as a matter of law it would be no defense to allege that plaintiff Mosley had assumed the risk by continuing to work.

If you find that the plaintiff had a preexisting physical condition which was aggravated or triggered by the accident, and that had the accident not occurred the condition would have remained quiescent, he is entitled to be compensated for the consequent injury or damage. But if you find that the plaintiff's injuries resulted solely from a previous condition or a previous incident, he is not entitled to recover in this action.

An injured person is entitled to recover for the harm actually suffered, even though the precise nature and extent of the injuries as they finally developed were more

severe than could ordinarily have been foreseen. In other words, a shipowner is chargeable for all the harm and suffering which the unseaworthiness, if you so find, of the vessel brought on, even though the plaintiff's injuries were aggravated by his own predisposition.

(479) Now what do we mean by "proximate cause"? If after a conscientious appraisal of all the facts you find that the vessel was not unseaworthy, you will return a verdict for the defendant Adra, and that will be the end of the case. But if you reach the conclusion that the vessel was unseaworthy, then you must proceed to the next question, which is was the unseaworthiness a proximate cause of injury to the plaintiff?

Proximate cause: An injury is proximately caused by an act or omission whenever it appears that the act or omission played any part, no matter how small, in actually and directly bringing about or causing the injury. So if you should find that even though the vessel was unseaworthy, such condition was not a proximate cause of the injuries sustained by the plaintiff, then again that would be the end of the case and you would bring in a verdict for the defendant Adra in this first action.

Adra says in effect the vessel was at that time seaworthy. It says further that even if you should say that it was unseaworthy, that unseaworthiness did not proximately cause any injuries to the plaintiff. And it goes further and says that the negligence on the part (480) of the plaintiff was a proximate cause of any injuries which he may have sustained.

If I were to labor between now and the end of the month I couldn't come up with any improvement, certainly within my limitations, of the simple definition, in effect, of negligence:—the failure on the part of a person injured to exercise reasonable care for his own safety which, cooperating in some degree with the unseaworthiness of the vessel, helps in bringing about the injury.

Let us examine that a moment further.

In determining whether Mosley was guilty of negligence, you may consider whether he was doing his work in the normal and habitual way, and whether he could observe and could himself have easily rectified or avoided the condition which he alleges caused the accident. But the test which you are to apply is whether he was doing that which a reasonably prudent longshoreman, engaged in similar work at that time and place, would not have been doing, or whether he omitted to do that which a reasonably prudent longshoreman would have done at the time and place in question, and under all the circumstances.

The burden is on a defendant, who alleges (481) affirmatively that the plaintiff contributed negligence, the burden is on that one making that charge, so to speak, to establish by a preponderance of the evidence in the case the claim that the plaintiff was negligent and that such negligence was a proximate cause of any injuries which the plaintiff may have sustained. Of course if you should find the plaintiff's alleged injuries were due solely, solely, to unseaworthiness, then your verdict must be for the plaintiff Mosley to the full extent of his provable damages.

On the other hand, if you should find that the injuries were not due to unseaworthiness, but were solely due to the plaintiff's own conduct is failing to act with reasonable care, or take reasonable precautions, then your verdict will be for the defendant Adra.

Now get this, too: however, if you find that the vessel was unseaworthy, and that such unseaworthiness proximately caused any injuries to the plaintiff, and if you further find that Mosley was guilty himself of some negligance which proximately contributed to his injuries, then the total damages awarded to plaintiff must be diminished or reduced to the extent that Mosley's negligence contributed to the accident. In other words, if you find that

Mosley himself was negligent, by a certain (482) percentage, you will reduce the damages accordingly, only if you also find that Adra gave to this plaintiff under those particular circumstances an unseaworthy vessel within the meaning of that term as I have attempted to define it.

That part of the case you have got to address yourselves to first. You didn't get into that jurybox without walking first to get into it. Likewise, you must consider what I have charged you up to now as the first ingredient before you come to the question of damages. We have got to settle these things that I have been talking to you about first. It is obvious.

So let us talk about damages, if you come to that point in your deliberations. And that is for you, not for me, and not for the attorneys.

If you find that the defendant Adra did not furnish the plaintiff a seaworthy vessel and that this was the proximate cause of the plaintiff's injuries, you may then, and only then, consider damages. The fact that I charge you on the question of damages carries with it no intimation that you are required to award damages. Such instruction is only to guide you in the event you have to determine the amount of damages.

If you determine that damages should be awarded, (483) the damages should include such sums as you find will compensate the plaintiff in the light of what I now take up.

One responsible for an injury must respond for all damages which result directly from and as a natural consequence of the wrongful act, according to common sense, in the usual course of events. Although the damages cannot be remote or contingent or speculative, they need not be immediate, they must, however, be proximately caused by the event and be independent of other intervening causes.

If you should award a verdict to the plaintiff, in arriving at the amount of that award you should take into account the following:

First, past and future medical expenses, that is, the actual expenses incurred by the plaintiff for medical and hospital care reasonably required and actually given in the treatment of the plaintiff; and also the reasonable and necessary expenses to the plaintiff for medical and hospital care, and so forth, which you find reasonably certain to be required in the future for the treatment of the plaintiff as a proximate result of the injuries in question, if you so find.

Second, past earnings loss, and that is the (484) reasonable value of the time necessarily lost up to date by plaintiff since the injuries because of being unable to pursue his occupation as a proximate result of the injury.

In determining this amount you should consider evidence of the plaintiff's earning capacity at the time he left his job, his actual gross earnings and the manner in which he ordinarily occupied his time before the injury, and you should find what he was reasonably certain to have earned during the time so lost had he not been disabled. For this purpose you may consider any increases in the hourly wage scale for the type of work Mosley had been doing until the time of his injuries.

Thirdly, future earnings: That is, the plaintiff claims that his injuries will have the effect of causing him to be less able to earn in the future, if at all.

If you determine that the plaintiff did suffer such injuries, and that his future earning capacity will be diminished as a result, he is entitled to an award to compensate him for this future loss of gross earning power, to the extent of the reasonable value of the gross earnings you determine he will lose in the future, without any deductions for income taxes.

(485) "Plaintiff has the duty, says the law, to mitigate damages by reasonable efforts to secure employment.

With respect to plaintiff's future earnings, you may consider his age, reasonably expectancy of working years, his health, physical ability and earning power before the accident; and now; the type of work he would be doing and the likelihood of future wage increases in the work he would be accustomed to do, as well as his ability to perform other work.

You may also consider the nature and extent of his injuries and their probable duration.

Next, pain and suffering. That is a sum which will compensate the plaintiff reasonably for any pain and discomfort suffered by him and proximately resulting from his injury, from the day of the accident to the present, and also for such pain and discomfort as he is reasonably certain to suffer in the future from the same cause, based upon the evidence presented to you. You must determine to your satisfaction the extent of the injuries, if any, which Mosley suffered. And he has, I repeat, the burden of proving the extent of his injuries as proximately resulting from the accident.

There is no precise yardstick which the Court (486) can give you to measure pain and suffering, but you may take into consideration the time that he was confined to bed or house, if you so find, and the effect of his injuries upon the normal pursuits and pleasures of life, and the hardships and the inconveniences involved—all of this only if the responsibility has been established in your minds.

A few words about expert witnesses.

Ordinarily the rules of evidence do not permit a witness to testify as to his opinions or conclusions. However, a so-called expert witness, such as a doctor, is an exception to the rule. By virtue of his education, experience a doctor may become expert in the science or profession, and he is permitted to state his opinion as to a matter in which

he is an expert, and which is material to the case, and he may also state the reasons for such opinion.

You should consider such expert opinion received in evidence in this case and give it such weight as you think it deserves. Bear in mind that evidence of statements as to aches or pains or injuries made to a doctor in connection with his examination or treatment is received in evidence solely for the purpose of enabling the doctor to tell you everything on which he, the doctor (487), may have based his opinion as to a person's physical condition, and should not be considered in determining damages, in other words, a plaintiff's statements as to aches and pains and injuries which he relates to the doctor.

On all the items of damage you are to be guided by your good common sense and experience, and such an award if any as you may decide upon must bear a reasonable relationship to the nature and the extent of the injuries which you find. All these elements of damages must then be added together in one lump sum.

Now, let us take up what I have been referring to as the second case, Adra v. Lipsett.

You are to consider this second suit only, only, in the event that you have decided in the first action that Mosley is entitled to an award against Adra. If your verdict in the Mosley action is in favor of Adra, obviously that ends your duties as to this second case.

In the second case Andra seeks to recover from Lipsett the full amount of any recovery awarded to Mosley. This is a claim for indemnity. It is based in substance on the fact that a stevedoring firm assumes the responsibility for the shipowner's damages resulting from an unsafe and improper performance of the stevedoring (488) services.

I charge you as a matter of law that in undertaking the stevedoring work on Adra's vessel, Lipsett was under a duty, regardless of any acts by Adra, to do the job in a

competent and workmanlike manner and this included the duty of seeing to it that the working area in which the man engaged in that operation was reasonably safe for them to carry on the work. Even though the vessel may have been unseaworthy when the cargo area was turned over to Lipsett, Lipsett cannot escape liability for indemnity if it knew or should have known of such condition and if under the circumstances it failed to take such remedial steps as a reasonable and prudent stevedoring company, through its agents and servants or employees, would take in the performance of its work.

In short, the stevedore warrants a workmanlike job, and this warranty may be breached when the acts of the stevedoring company or its employees do no more than call into play the vessel's unseaworthiness.

Here Adra claims that Lipsett, acting through its employees, failed in its duty to provide reasonably safe lighting, working area, for the loading operations on board Adra's vessel, and that such acts constitute a failure on Lipsett's part to perform its stevedoring job (489) in a workmanlike manner.

Lipsett contends that the evidence shows you that it has fulfilled this duty, the duty that it owed to Adra. That is for you to determine. And in this action, too, the mere fact that the accident occurred does not establish Adra's claim.

Here Adra has the burden of establishing by a fair preponderance of the evidence that Lipsett failed in its obligation to perform its job in a workmanlike manner, and that such failure was the proximate cause of the alleged unseaworthiness to the vessel, which resulted in Mosley's injuries.

If you find that Adra has sustained its burden in this second action, you will return a verdict in its favor and against Lipsett for the amount which you award in favor

of Mosley, if you do so award in the first action against Adra.

Now, your verdict in each case must be unanimous.

You must consider and arrive at a verdict in each case separately, and you will return separate verdicts. Your verdict in each case will be reported as follows:

In the case of the plaintiff Mosley against Adra, either in favor of the plaintiff—if so, in what amount—or in favor of the defendant Adra.

(490) In the case of Adra against Lipsett, your verdict will either be in favor of Adra for the amount which you award to Mosley in the first action, or in favor of Lipsett.

Let me instruct you once again: If you find for Adra in the first action, that is the end of your deliberations and you are not to consider the second action.

It is your duty as jurors to confer with one another and to deliberate with a view to reaching an agreement. Each of you must decide the case for himself, but you should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced it is erroneous.

Discuss and weigh respective opinions dispassionately, without regard to sympathy, prejudice or favor for either party, and adopt that conclusion which in your good conscience appears to be in accordance with truth.

This Court would remind you that in your deliberations in the juryroom there can be no triumph except in the ascertainment and declaration of the truth.

The case is submitted to you with confidence on (491) the part of the Court that the oath of office which you took as jurors, to fairly and impartially pass upon the evidence without fear or favor render a verdict, will be fully observed.

You may have any of the pleadings or the documents or the exhibits which are in evidence, to construct in connection with your deliberations.

When you have reached your verdicts, or under the circumstances I described, a verdict, you will so inform the marshal and you will then be returned to the jurybox to state in open court what that verdict is or what those verdicts are.

I commend you to the faithful performance of your sworn duty, that is without fear or favor. I repeat, to any man, you are to will and truly try the issues in this case according to the evidence presented and under the law that is applicable, as stated to you by the Court.

* * * * * * *

(492) Mr. Catoggio: Yes.

I would like to note on the record an objection and exception to the main body of the charge, with respect to unseaworthiness—and I will be more specific later as I go on—but particularly so much of the charge as says in words or in substance, or conveys the thought to the jury, that a duty existed on Adra continuously during the progress of work by Lipsett, the stevedores, to maintain that vessel in a seaworthy condition. In that regard I refer directly to those portions of your Honor's (493) charge that the liability for the unseaworthy condition existing at any time, even if caused by the stevedoring company, would be imposed on Adra.

Further on I noted that your Honor said Mosley was an employee of Lipsett and that fact did not relieve Adra of the duty to supply a seaworthy vessel, even if the unseaworthiness was created by Mosley, or permitted to exist by Mosley.

Further, your Honor said—and I believe I have it accurately—who creates the unseaworthiness condition is not a defense to the vessel owner if you find in fact that the vessel is unseaworthy.

I submit to your Honor that the cases are abundantly clear, and the Calabrese case is directly in point, where

it was expressly said that during the course of loading operations the vessel necessarily must become unseaworthy in certain respects, but that is not the unseaworthiness contemplated in the Sirachi case.

Again, your Honor said also if other inadequacies created by the stevedore resulted in the vessel being unseaworthy, then Adra is liable.

Earlier your Honor had said the unseaworthiness for which Adra would be liable, which plaintiff must establish, is an absolute duty to keep and maintain all (494) decks, tools, appliances in proper condition at all times. I submit, your Honor, that is a direct misstatement of the law as I understand it, and it is all part and parcel of my objection and exception.

Furthermore, there is a total absence in the charge of the explanation to the jury in connection with furnishing a reasonably safe vessel for the plaintiff to work on; that that duty extends as of the time when he boards the vessel and starts his work.

I further object and except to so much of your Honor's charge as said in words or in substance, or created the impression, that if the vessel is unseaworthy it is no defense that Mosley continued to work, and he cannot be charged with assuming the risk. I submit to your Honor that assumption of risk is a defense in this case. It is not a Jones Act case. He certainly would be charged with open and apparent conditions, and he also would be charged with the ordinary dangers of his occupation.

I further object and except to so much of your Honor's charge as said that the burden of proof as to contributory negligence being the sole cause of the accident is on the defendant. And I point out to your Honor again, this is not a Jones Act case. This case is (495) in this Court on diversity of citizenship. Merely because it was an accident on maritime waters does not give this Court jurisdiction in the absence of diversity of citizenship.

Appendix.

The rule of Civil Practice which refers to burden of proof, and the decision in the Erie v. Tompkins, in the Supreme Court of the United States, does not apply in diversity of citizenship cases, as I understand it. So that the burden of proof, to prove freedom from contributory fault as the sole cause of the accident, would be on the plaintiff.

Now, I further object and except to so much of your Honor's charge that directed the jury to determine the loss of earnings of the plaintiff without deduction from his possible potential income of income taxes. I am making that objection for the record, your Honor.

The Court: Sure.

Mr. Catoggio: There is a case, the O'Connor v. United States case, which said they can take his net income, his take-home pay, but I concede that was a tort liability case, and that brought into play the, what was it, the Utah law or—you know, the tort liability statute throws you back into the state law, and under Utah law—I think it was Utah—there was some question (496) whether that wouldn't be the rule. But I say it is an open question.

I further object and except to so much of your Honor's charge with respect to indemnity, as directed the jury—as said in words or substance to the jury, or created the impression, that Lipsett would be liable for indemnity regardless of acts by Adra if during the course of its work the area where the work was being accomplished became unseaworthy, or if Lipsett during the course of its work permitted it to become unseaworthy.

The Court: Will you suffer an interruption?

Mr. Catoggio: Yes, your Honor.

The Court: Off the record.

(Discussion off the record.)

Mr. Catoggio: I further object and except to so much of your Honor's charge as said in words or substance that

if Lipsett did anything that brought into play the unseaworthiness of the vessel, then it would be liable for indemnity—that coupled with the statement or the reference that if Lipsett failed to cause light and proper tools to be used it would thereby bring into play unseaworthiness.

Now, I confess I didn't get the exact wording (497) of that, so much of that charge, but based on the first part of my objections to your Honor's charge, it again brings up this question that if the vessel was seaworthy when Lipsett started to work, and because of their doing the work the vessel became unseaworthy, that Adra would be cast in liability, and this follows it up with the suggestion that Lipsett would be cast in liability over.

My final objection and exception to your Honor's charge has to do with the instruction, which said in words or substance, or created the impression, that the jury was required to reach an agreement, and that they had to forfeit their personal opinions and come to a unanimous agreement, come what may. I do not understand that to be the obligation of jurors.

The Court: Your objections and exceptions are noted, Mr. Catoggio, and I adhere to the charge.